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No. ——

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

SHARON TEMKIN, *et al.*,
Petitioners,

v.

FREDERICK COUNTY COMMISSIONERS, *et al.*,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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PETITION FOR A WRIT OF CERTIORARI

GRETA C. VAN SUSTEREN
Counsel of Record
JOHN P. COALE
PHILLIP B. ALLEN
MARK A. ALLEN
COALE, ALLEN & VAN SUSTEREN
5335 Wisconsin Avenue, N.W.
Washington, D.C. 20015
(202) 686-6500
Counsel for Petitioners

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QUESTIONS PRESENTED

1. Did the Court of Appeals for the Fourth Circuit err in adopting a standard of "shocks the conscience" for a substantive due process violation under 42 U.S.C. § 1983, when all other circuit courts have adopted standards ranging from "gross negligence" to "recklessness" to "deliberate indifference" for similar conduct?

2. Did the courts below err in granting the respondents' motion for summary judgment and thereby usurp the role of the jury when (1) genuine issues of material fact existed, (2) the courts considered the evidence in the light most favorable to the *respondent*, the moving party, and (3) a reasonable jury could construe a high-speed police chase of a misdemeanant at speeds in excess of 100 miles per hour, at night, in a populated area, along a narrow, winding, two-lane road as both "shocking" and worthy of a finding of "deliberate indifference?"

3. Did the courts below decide respondents' motion for summary judgment prematurely when the petitioners filed an affidavit under Rule 56(f) that material discovery had yet to be completed?

LIST OF PARTIES

The parties to the proceedings below were the petitioners Sharon Temkin and Bruce Temkin and the respondents Frederick County Supervisors and Glen Marion Selby, Jr.

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PETITION FOR A WRIT OF CERTIORARI

The petitioners Sharon Temkin and Bruce Temkin respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit, entered in the above-entitled proceeding on September 12, 1991.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fourth Circuit is reported at 945 F.2d 716 (4th Cir. 1991) and is reprinted in the appendix hereto, p. 1a, *infra.*

The memorandum decision of the United States District Court for the District of Maryland (Nickerson, D.J.) has not been reported. The decision is reprinted in the appendix hereto, p. 18a, *infra.*

JURISDICTION

Invoking federal jurisdiction under 42 U.S.C. § 1983, the petitioners brought this suit in the United States District Court for the District of Maryland. On July 2, 1991, the district court entered a judgment and an opinion granting the respondents' motions for summary judgment and dismissed the case. See pp. 18a, 33a, *infra*.

On petitioners' appeal, the Fourth Circuit on October 9, 1991 affirmed the decision of the district court. See p. 17a, *infra*. No petition for rehearing was sought.

Jurisdiction is conferred on this Court pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

U.S. Const. amend. XIV, § 1.

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. § 1983.

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of

Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

This case arises out of a collision between an automobile driven by the petitioner Sharon Temkin and a police cruiser operated by the respondent Glenn M. Selby, a Frederick County, Maryland deputy sheriff, and owned by the respondent Federick County Commissioners. At the time of the collision, Deputy Selby was engaged in a high-speed chase of a third vehicle.

On July 14, 1987, at approximately 10:00 p.m., Deputy Selby observed a car spinning its wheels and exiting a Frederick County Texaco station on Route 85. Selby, who was parked in a nearby mall, turned on his lights and siren and gave chase. The pursued car began to drive at a high rate of speed down Maryland Route 355.

During the course of the chase, the attendant at the Texaco station telephoned 911 and reported a theft of approximately $17.00 of gasoline. Although the respondents contend that the 911 call was made and relayed to Selby, the records regarding a 911 call and any such transmission as well as the dispatcher's version of the events were destroyed under mysterious circumstances. Radio tapes purportedly documenting the pursuit were also missing.

The chase proceeded at speeds ranging between 65 and 105 miles per hour southbound on Route 355. Route 355 is a narrow, winding, two-lane road in a highly populated area. Along the route, a carnival was being held which had a large attendance and, as a result, cars were parked along both sides of the road. Also, relatively early on in the chase, Selby was able to identify and report the vehicle's description and license plate number.

Prior to July 14, 1987, the Frederick County Sheriff's Department promulgated a regulation, General Order

204, which governs the conduct of police officers in the operation of department vehicles, including high-speed pursuits.

General Order # 204 cautions generally that "the first concern of the operator of the police vehicle must be the safety of other motorists, pedestrians and fellow officers." In addition, with respect to high-speed chases, the regulation directs:

> Safety is the prime consideration when engaged in the pursuit of another vehicle. Deputies *will not under any circumstances* pursue at a speed so great as to render their vehicle uncontrollable thereby endangering the lives of others or themselves.

General Order # 204 also mandates:

> [A]ny pursuit *will be terminated* regardless of the seriousness of the crime when weather, traffic, road conditions or locale make further pursuit *unreasonably hazardous* to the safety of the public or the deputy involved. . . .

Finally, General Order # 204 directs that "the on-duty supervisor *shall* monitor said pursuits and shall have the authority to halt the pursuit if warranted."

The on-duty supervisor on the evening of July 14, 1987 was Corporal Gregory Eyler. At the time the pursuit began, Corporal Eyler was with another Frederick County deputy, Deputy Williar, and was in the process of responding to a potential break-in approximately five or six miles away from the beginning point of the pursuit.

Although Eyler was aware that Selby was involved in a high-speed chase, he could not monitor the pursuit because his radio was not functioning properly. Eyler could have monitored the pursuit from Deputy Williar's police cruiser, but chose not to in direct contravention of General Order # 204.

Notwithstanding the minor nature of the infraction, that Selby had identified and reported the vehicle's de-

scription and tag number, and the condition of the roadway—narrow, crowded and at night—Selby continued to chase the vehicle at extremely high speeds.[1] Indeed, the chase continued for a significant period of time over a ten-mile area. Eventually the pursued vehicle lost control, crossed over the double yellow line and struck the right front of petitioner Sharon Temkin's car. As a result of this initial collision, Mrs. Temkin's car was caused to spin in a clockwise direction. Selby attempted a panic stop, but skidded across the double yellow line out of control and struck Mrs. Temkin's car broadside on the driver's side. Just prior to the collision, Selby was traveling between 75 and 80 miles per hour.[2] After the collision, Deputy Selby and an assisting officer, Pauley, chose to apprehend the misdemeanant and ignored Mrs. Temkin's needs.

As a result of the collision between Mrs. Temkin's car and Selby's police cruiser, Mrs. Temkin sustained massive injuries, including ankle fractures, a femur fracture, pelvic fractures, internal injuries and a closed head injury. Due to her injuries, Mrs. Temkin has no independent recollection of the collision.

The Frederick County Sheriff's Department conducted an investigation of the incident. Although the Sheriff's department elected not to discipline Deputy Selby, it classified the collision as "preventable."

The subject of high-speed police chases causing serious injury and death to innocent citizens is a nationally recognized problem and has been widely discussed in the media, including the national networks. The Frederick County

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[1] Selby testified that he continued the chase to warn the public of the on-coming vehicle. Petitioners strongly contest this self-serving justification.

[2] Respondents contend that Selby was traveling 45 miles per hour at the point of impact. Selby testified that he had no idea how fast he was traveling.

County Commissioners, as ultimately responsible for the Frederick County Sheriff's Department, were on notice of this serious problem. Nevertheless, the respondent Commissioners made a conscious choice to require no specialized training on the subject of high-speed pursuits. In fact, the Commissioners made no effort to determine what training or policies, if any, the Frederick County Sheriff's Department employed concerning such pursuits.

Accordingly, although the dangers of high-speed chases are well known, the only "training" the Commissioners provided to Frederick County deputy sheriffs, including Deputy Selby, was General Order # 204, of which Selby testified he was "aware." [3]

This conscious choice to pursue a woefully inadequate chase policy, without strict guidance and parameters, only operated to encourage such pursuits to apprehend individuals suspected of committing even relatively minor violations at the expense of the safety and well-being of the innocent public. Here, the conscious choice caused Deputy Selby to have the discretion to engage in an ill-advised chase—to apprehend at all costs an individual for traffic violations and the theft of $17.00 of gasoline—causing the collision which injured the petitioner Mrs. Temkin.

Petitioners have retained the services of two experts, Geoffrey Alpert and Robert di Grazia, each of whom has considerable expertise in police pursuit matters. Dr. Alpert testified that Deputy Selby's conduct was reckless and wanton and found that the conduct of the Frederick County Commissioners in choosing an inadequate pursuit policy was equally reprehensible. Mr. di Grazia testified that the Frederick County pursuit procedures were wholly deficient and that Selby's conduct violated even the poorly drafted pursuit policy. Mr. di Grazia also testified that Selby's conduct was directly attributable to the Commissioners' inadequate policies and failure to train.

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[3] At deposition, Selby was unsure of the exact details and requirements of General Order #204.

On May 10, 1989, the petitioners filed a complaint pursuant to 42 U.S.C. § 1983 in the United States District Court for the District of Maryland alleging that respondents violated petitioners' substantive due process rights under the 14th amendment. The complaint alleged: 1) that Deputy Selby operated his police cruiser with recklessness, gross negligence, and wilful, wanton and conscious disregard for the safety of Mrs. Temkin; and 2) that the respondent Commissioners' conscious choice of an inadequate high-speed pursuit policy constituted deliberate indifference toward the rights of those using the public highways and proximately caused the collision which injured Mrs. Temkin. The petitioners also alleged state-law claims of negligence under pendent jurisdiction.

During the course of pre-trial discovery, Senior United States District Judge Edward S. Northrop issued an Amended Scheduling Order ordering all discovery to be completed by June 12, 1990.

On March 29, 1990, the respondents moved for summary judgment. On April 4, 1990, the petitioners responded to the motion and also filed an affidavit pursuant to Rule 56(f) of the Federal Rules of Civil Procedure stating that discovery was incomplete and that they required additional discovery in order to oppose respondents' motion for summary judgment. See p. 34a.

In particular, petitioners desired to take the depositions of a Frederick County commissioner and of Lieutenant Gary Wood, a member of the Frederick County Sheriff's Department. Petitioners' experts required transcripts of those depositions, as well as transcripts of two other depositions which had yet to be transcribed, in order for them to render a final opinion that Deputy Selby was reckless and wanton in the conduct of the high-speed chase. The discovery also would have produced additional information concerning the liability of the Commissioners.

Notwithstanding petitioners' Rule 56(f) affidavit and Judge Northrop's pre-trial order, United States District

Judge William M. Nickerson granted respondents' motion for summary judgment on July 2, 1990.

Several aspects of the district court's memorandum opinion require emphasis:

First, the district court noted that other circuits have employed standards of "gross negligence" or "deliberate indifference" for substantive due process violations. Nevertheless, the court adopted the reasoning of *Smith v. Bernier*, 701 F. Supp. 1171 (D. Md. 1988), that this Court's opinion in *Rochin v. California*, 342 U.S. 165 (1952), "identifies the traditional standard for determining whether a substantive due process violation occurred by asking whether the conduct '*shocks the conscience*'" (p. 23a).

Second, the court did not consider the evidence in the light most favorable to the petitioner in violation of Rule 56. Relying entirely on the self-serving testimony of Deputy Selby, the district court found that Selby's high-speed pursuit did not "transcend the barrier between negligence and conduct that shocks the conscience" (p. 27a). The district court also held that respondent Commissioners did not act with "deliberate indifference" to the petitioners' constitutional rights when they failed to adopt an adequate training program. The court, however, completely ignored—and in fact did not mention—the testimony of petitioners' experts that the conduct of Selby *and* the Commissioners was reckless and wanton and that the policies concerning high-speed pursuits were woefully inadequate. Accordingly, the court did not even consider the petitioners' evidence—evidence which Rule 56 requires the court to accept and view in the light most favorable to the petitioners. See p. 33a.

Third, the district court failed to mention petitioners' Rule 56(f) affidavit.

After the district court denied the petitioners' motion for reconsideration, the petitioner appealed to the Fourth

Circuit. In affirming the trial court's judgment, the Fourth Circuit, like the district court, recognized that other circuit courts have adopted standards ranging from "gross negligence" to "deliberate indifference" to "recklessness" for § 1983 substantive due process claims. See p. 12a.

Nevertheless, the court adopted the "shocks the conscience" standard for high-speed pursuit cases. The court rested its decision on: 1) other circuit court cases employing a lesser standard do not involve the driving of official vehicles or involve situations where governmental control over the claimant is intentional and direct; 2) several circuit courts considering high-speed pursuits failed to find, on the facts before them, that the conduct was grossly negligent or reckless, *even though* these cases do not support the proposition that the appropriate standard should be "shocks the conscience"; and 3) the court's belief that *Rochin* enunciates the proper standard for police pursuit cases.

Thus, although the other circuit courts have adopted standards of gross negligence, recklessness or deliberate indifference for substantive due process cases *including* police pursuit cases, the Fourth Circuit nonetheless carved out an exception for police pursuit cases and required a more stringent, "shocks the conscience" standard.

The circuit court then, like the district court, failed fully to consider the petitioners' evidence and found that "Selby's conduct, while disturbing and lacking in judgment, falls short of the 'shocks the conscience' standard . . ." (p. 15a). Bcause Selby had not violated the petitioners' constitutional rights, the court reasoned that summary judgment in favor of the Commissioners was proper on the claim of inadequate training. *Id.* The court also denied petitioners' claim concerning their Rule 56(f) affidavit because, in its view, the additional discovery would have been immaterial to the district court's judgment (p. 17a).

REASONS FOR GRANTING THE WRIT

This Court should grant petitioners' Petition for a Writ of Certiorari because: 1) the Fourth Circuit's decision concerning the standard for substantive due process claims under 42 U.S.C. § 1983 raises important and unresolved issues, conflicts with decisions of other Circuits and is plainly wrong; and 2) the Fourth Circuit's decision concerning summary judgment conflicts with decisions of this Court and other decisions of the Fourth Circuit and is plainly wrong.

I. THE FOURTH CIRCUIT'S DECISION TO APPLY THE "SHOCKS THE CONSCIENCE" STANDARD TO THIS CASE RAISES IMPORTANT AND UNRESOLVED ISSUES, CONFLICTS WITH DECISIONS OF OTHER CIRCUITS AND IS PLAINLY WRONG.

In their opinions below, the district and circuit courts ignored the clear weight of authority in the other circuit courts and adopted the "shocks the conscience" standard for high-speed pursuit cases, thereby carving out an exception which operates as a judicial grant of qualified immunity to police officers. This Court should grant certiorari to review this issue because it raises important and unresolved issues, conflicts with decisions of other circuits and is plainly wrong.

A. The Decision Raises Unresolved Issues and Conflicts With Decisions of Other Circuits.

In *Daniels v. Williams*, 474 U.S. 327 (1986) and *Davidson v. Cannon*, 474 U.S. 344 (1986), this Court held that an official's negligent act which causes unintended loss of life, liberty or property does not implicate the due process clause of the Fourteenth Amendment. The Court specifically declined, however, to resolve "whether something less than intentional conduct, such as recklessness or 'gross negligence,' is enough to trigger the pro-

tections of the Due Process Clause." *Daniels*, 474 U.S. at 334 n.3.[4]

Here, the petitioners have alleged that Deputy Selby operated his police cruiser with recklessness, gross negligence, and wilful, wanton and conscious disregard for the safety of Mrs. Temkin. Accordingly, this case squarely presents the Court with an opportunity to decide the very issue it reserved in *Daniels*.

An even more compelling reason for this Court to grant certiorari is that the Fourth Circuit's decision to reject "gross negligence," "recklessness," or "deliberate indifference" in favor of a "shocks the conscience" standard conflicts with decisions from nearly every other circuit.

Most circuit courts have decided that an official's reckless or deliberate indifference may give rise to a due process claim.[5] The circuits are split, however, over whether gross negligence violates due process. For example, the Third, Sixth and Ninth Circuits have held that gross

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[4] *See also, Whitley v. Albers*, 475 U.S. 312, 327 (1986); *City of Canton v. Harris*, 109 S. Ct. 1197, 1204 n.8 (1989).

[5] *See, e.g., Torres Ramirez v. Bermuda Garcia*, 898 F.2d 224 (1st Cir. 1990) (reckless or callous indifference); *Germany v. Vance*, 86 F.2d 9 (1st Cir. 1989) (same); *Morales v. Department of Corrections*, 848 F.2d 27 (2d Cir. 1988) (deliberate indifference); *Lopez v. Houston Indep. School Dist.*, 817 F.2d 351 (5th Cir. 1987) (callous indifference); *Jacquez v. Procunier*, 801 F.2d 79 (5th Cir. 1988) (same); *Archie v. City of Racine*, 847 F.2d 1211 (7th Cir. 1988) (en banc) (recklessness), *cert. denied*, 109 S. Ct. 1338 (1989); *Wood v. Ostrander*, 879 F.2d 583 (9th Cir. 1989) (deliberate indifference), *cert. denied*, 111 S. Ct. 341 (1990); *Harris v. Maynard*, 843 F.2d 414 (10th Cir. 1988) (wanton or obdurate disregard or deliberate indifference); *Taylor ex. rel. Walker v. Ledbetter*, 818 F.2d 791 (11th Cir. 1987) (en banc) (deliberate indifference), *cert. denied*, 109 S. Ct. 1337 (1989); *Committee of United States Citizens Living in Nicaragua v. Reagan*, 859 F.2d 929 (D.C. Cir. 1988) ("some reckless acts may constitute due process violations while others may not"). *But see Washington v. District of Columbia*, 802 F.2d 1478 (D.C. Cir. 1986) (recklessness not enough).

negligence may provide a basis for a due process claim.[6] In contrast, the First, Seventh and Eighth Circuits have reached the opposite conclusion.[7]

Regardless of the split between the circuits, the above makes clear that heretofore every circuit in some fashion has recognized *at the very least* that a claim of recklessness or deliberate indifference constitutes a violation of substantive due process. The Fourth Circuit's "shocks the conscience" standard thus conflicts with decisions in every other circuit. Accordingly, this Court should grant certiorari to resolve this conflict.

B. The Decision Is Plainly Wrong and Works an Absurd Result.

The district court and the Fourth Circuit each conceded that the clear weight of authority is that conduct amounting to gross negligence, recklessness or deliberate indifference generally may give rise to a substantive due process violation. For example, in *Britt v. Little Rock Police Department*, 721 F. Supp. 189 (E.D. Ark. 1989), the district court, in the context of a police pursuit, stated:

> Cases after *Daniels* and *Davidson* have generally agreed that recklessness, which may be defined as

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[6] *See, e.g., Metzger v. Osbeck*, 841 F.2d 518 (3d Cir. 1988); *Colby v. Upper Darby Township*, 838 F.2d 663 (3d Cir. 1988); *Jones v. Sherrill*, 827 F.2d 1102 (6th Cir. 1987); *Vinson v. Campbell County Fiscal Court*, 820 F.2d 194 (6th Cir. 1987); *Nishiyama v. Dickson County*, 814 F.2d 277 (6th Cir. 1987) (en banc); *Hammond v. County of Madera*, 859 F.2d 797 (9th Cir. 1988); *Fargo v. San Juan Bautista*, 857 F.2d 638 (9th Cir. 1988); *Estate of Conners v. O'Connor*, 846 F.2d 1205 (9th Cir. 1988), *cert. denied*, 109 S. Ct. 1338 (1989). *But see Wood v. Ostrander*, 879 F.2d 583 (9th Cir. 1989), *cert. denied*, 111 S. Ct. 341 (1990).

[7] *See, e.g., Germany v. Vance*, 868 F.2d 9 (1st Cir. 1989); *Archie v. City of Racine*, 847 F.2d 1211 (7th Cir. 1988), *cert. denied*, 109 S. Ct. 1338 (1989); *Tallman v. Reagan*, 846 F.2d 494 (8th Cir. 1988); *Myers v. Morris*, 810 F.2d 1437 (8th Cir. 1987), *cert. denied*, 108 S. Ct. 97 (1987).

> "intentionally doing an act of an unreasonable character and disregard of a known or obvious risk that was so great as to make it highly probable that harm would follow," . . . is sufficiently like intent that due process is implicated.

721 F. Supp. 189 at 192. *See also Germany v. Vance*, 868 F.2d 9, 18 n.10 (1st Cir. 1989) (court regarded reckless behavior as a lesser form of intent rather than a higher form of negligence).

The Fourth Circuit distinguished such cases, however, because either they did not involve the driving of official vehicles or they were cases where governmental control over the claimant is intentional and direct. See pp. 12a, 14a. The Fourth Circuit instead adopted the "shocks the conscience" standard enunciated in *Rochin v. California*, *supra*.

This reasoning is erroneous in several respects. First, the circuit court distinguished cases where governmental control over the claimant is intentional and direct, yet adopted the standard enunciated in *Rochin*. In *Rochin*, three Los Angeles County deputy sheriffs apprehended Rochin, took him to a local hospital and forced him to have his stomach pumped. *Rochin*, 341 U.S. 165, 166. Accordingly, *Rochin* involved government control at least as intentional and direct as any other case petitioners cited and the circuit court distinguished.

The Fourth Circuit also cited four circuit court cases—*Roach v. City of Fredericktown*, 882 F.2d 294 (8th Cir. 1989), *Cannon v. Taylor*, 782 F.2d 947 (11th Cir. 1986), *Jones v. Sherrill*, 827 F.2d 1102 (6th Cir. 1987) and *Walton v. Salter*, 547 F.2d 824 (5th Cir. 1976)—which involved police pursuits in support of its decision that "shocks the conscience" is the appropriate standard. See p. 10a. *Cannon*, *Jones* and *Walton*, however, only decided that the facts of those cases did not rise to the level of gross negligence or recklessness needed to constitute a violation of substantive due process.

In fact, of these cases, only *Roach* even mentions "shocks the conscience." There, although the plaintiff *pleaded* the "shocks the conscience" standard, the Eighth Circuit *ruled* that negligent or grossly negligent conduct did not state a claim under § 1983. *Roach*, 882 F.2d at 297.

Accordingly, far from supporting the Fourth Circuit's decision, *Roach*, *Cannon*, *Jones* and *Walton* actually support petitioners' contention that a standard of gross negligence, recklessness or deliberate indifference is more appropriate.

The Fourth Circuit's real concern appears to be that the conduct at issue should constitute such an unjustified use of authority "as to transcend the bounds of ordinary tort law and establish a deprivation of constitutional rights" (p. 10a). Indeed, in *Daniels* this Court stated that to hold simple negligence a deprivation under the Fourteenth Amendment "would trivialize the centuries-old principle of due process of law." *Daniels*, 174 U.S. 327, 332.

However, this Court has repeatedly emphasized that § 1983 should be construed "to give a broad remedy for violations of federally protected civil rights." *Monell v. Department of Social Servs.*, 436 U.S. 658, 685 (1978). The legislative history of § 1983 shows that Congress clearly intended that the statute encompass violations such as personal injuries:

> The atrocities that concerned Congress in 1871 plainly sounded in tort. Relying on this premise we have found tort analogies compelling in establishing the elements of a cause of action under § 1983. . . .
>
> * * * *
>
> Among the potential analogies, Congress unquestionably would have considered the remedies established in the Civil Rights Act to be more analogous to tort claims for personal injury. . . .
>
> * * * *

> Had the 42d Congress expressly focused on the issue decided today, we believe it would have characterized § 1983 as conferring a general remedy for injuries to personal rights.

Wilson v. Garcia, 471 U.S. 261, 277-278 (1985). Accordingly, § 1983 "should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions." *Monroe v. Pape*, 367 U.S. 165, 187 (1961).

What distinguishes this case as a violation of civil rights from cases involving simple negligence can be readily shown through a comparison to *Daniels*, *Davidson v. Cannon*, 474 U.S. 344 (1986), and *Smith v. Bernier*, 701 F. Supp. 1171 (D. Md. 1988), relied on by the courts below.

In *Daniels*, an inmate was injured when he slipped on a pillow negligently left on a stairway by a deputy sheriff. *Id.*, 174 U.S. 327, 332. In *Davidson*, the petitioner was threatened by a fellow inmate and sent a note reporting the incident to prison officials. *Davidson*, 474 U.S. at 346. The Court stated: "Far from abusing governmental power, or employing it as an instrument of oppression, respondent Cannon mistakenly believed that the situation was not particularly serious, and respondent James simply forgot about the note." *Id.* at 348. Similarly, in *Smith*, a privately-owned dump truck performing work for the State of Maryland collided with another vehicle when it entered a highway. *Smith*, 701 F. Supp. at 1173.

Daniels, *Davidson* and *Smith*, then, all involve conduct which can only be described as simple negligence and involve no real abuse of governmental power.

The present case, however, stands in sharp contrast to the situations presented in *Daniels*, *Davidson* and *Smith*. Rather than negligently causing an accident as in *Smith*, Deputy Selby here was intentionally chasing a vehicle whose occupants were wanted only for traffic violations and for the theft of $17.00 of gasoline. Selby had deter-

mined and reported the license plate number and description of the vehicle he was chasing. He had other options than to continue the chase.

Despite these facts, Selby intentionally put the public in danger as he conducted the chase at speeds up to 105 miles per hour, at night, through a highly-populated area, on a narrow two-lane road, and over a ten-mile area. In addition, Selby intentionally continued the chase despite General Order #204's dictate that "any pursuit *will be terminated* regardless of the seriousness of the crime when weather, traffic, road conditions or locale make further pursuit unreasonably hazardous to the safety of the public. . . ."

Far from simple negligence, this case presents a situation of recklessness and callous indifference to public safety in connection with a true abuse of government power—the police power of the state. True, Mrs. Temkin was not under intentional and direct government control in the classic sense, such as being incarcerated. Nevertheless, it was certainly foreseeable that continuing the chase would result in serious injury or death to an innocent citizen such as Mrs. Temkin. This foreseeability of harm in effect placed Mrs. Temkin under government control. Mrs. Temkin was at the whim of Selby's reckless abuse of his position as a police officer and was thus no less subject to abuses of the government's significant power had she been incarcerated.

Thus, Mrs. Temkin is in federal court not because she was involved in an automobile accident due to simple negligence, but because she was gravely injured as the result of an outrageous abuse of government power.

Indeed, the absurdity of the Fourth Circuit's decision is that Mrs. Temkin would have been in a *better* position had she been incarcerated or had she been the person Selby was actually chasing. In the context of incarceration, this Court has found that the appropriate standard

is deliberate indifference to the rights of a prisoner. *See, e.g., Estelle v. Gamble*, 429 U.S. 97, 105 (1976). In the context of the fleeing offender, the Court has decided that such cases must be decided under the Fourth Amendment's "reasonableness" standard. *Graham v. Connor*, 109 S. Ct. 1865 (1989). Accordingly, under the Fourth Circuit's reasoning at least, a prisoner or a fleeing felon has greater constitutional protection from governmental abuses than does an innocent motorist such as Mrs. Temkin. Plainly, this result is absurd.

Thus, this Court should grant certiorari to consider the Fourth Circuit's "shocks the conscience" standard because it raises important and unresolved issues, conflicts with decisions of other circuit courts, and is plainly incorrect.

II. THE FOURTH CIRCUIT'S DECISION AFFIRMING THE DISTRICT COURT'S GRANTING OF SUMMARY JUDGMENT CONFLICTS WITH DECISIONS OF THIS COURT AND OTHER DECISIONS OF THE FOURTH CIRCUIT AND IS PLAINLY WRONG.

The Fourth Circuit held that the district court was correct in granting respondents' motions for summary judgment despite 1) that genuine issues of material fact did exist and that the district court, in ignoring the testimony of petitioners' expert witnesses, failed to accept the evidence in the light most favorable to the petitioners; and 2) that additional discovery had yet to be completed. The Fourth Circuit's decision conflicts with decisions of this Court and other decisions of the Fourth Circuit and thus was incorrect.

A. The Courts Below Impermissibly Usurped the Role of the Jury in Granting Summary Judgment.

The district and circuit courts erroneously interpreted the role of a trial court in assessing the facts before it on a motion for summary judgment. In *Miller v. Leath-*

ers, 913 F.2d 1085 (4th Cir. 1990), the Fourth Circuit defined the standard for deciding summary judgment as follows:

> Summary judgment is appropriate only when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. . . . The facts and inferences to be drawn from the facts must be viewed in the light most favorable to the non-moving party, and this party is entitled "to have the credibility of his evidence as forecast assumed, his version of all that is in dispute accepted, [and] all internal conflicts in its version of all that is in dispute accepted."

913 F.2d at 1087, *quoting Charbonnages de France v. Smith*, 597 F.2d 406, 414 (4th Cir. 1979).

In connection with making determinations on summary judgment, this Court has emphasized that summary judgment should not denigrate the role of the jury.

> Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge.

Anderson v. Liberty Lobby, Inc., 477 U.S. 251, 255 (1986).

Following *Anderson*, the Fourth Circuit has repeatedly admonished that a trial court must not act as a trier of fact. In *Paroline v. Unisys Corporation*, 879 F.2d 100 (4th Cir. 1989), for example, the court stated:

> We do not deny that a fact-finder might reasonably conclude, as does Judge Wilkinson, that Unisys acted with noble intentions in response to Paroline's complaints of harassment. We are not triers of fact, however, and do not have the authority to usurp the fact-finder's function of deciding which of two permissible inferences about Unisys' intent to draw from the evidence. . . . Questions of intent are quintessentially ones for the fact-finder under most cir-

> cumstances, and we see no reason to depart from that principle here.

879 F.2d at 109. Similarly, in *Summerlin v. Edgar*, 809 F.2d 1034 (4th Cir. 1987), the court held:

> The judge's job in deciding a motion for summary judgment under Rule 56(c) is not to decide issues of fact, but to determine whether there is any genuine issue of material fact to be decided.

809 F.2d at 1039.

Notwithstanding these decisions, the district and circuit courts erroneously decided the summary judgment issue and thus usurped the fact-finding function of the jury.

First, genuine issues of material fact clearly existed for a jury to consider. Whereas the petitioners contended that the speed of Selby's vehicle just prior to the accident was around 65 miles per hour, the respondents claimed that Selby was only traveling 45 miles per hour.[8] Selby testified that he continued the chase in order to protect the public by warning them of the on-coming car. The petitioners strongly contest this self-serving justification. Finally, petitioners' experts testified that the conduct of both Selby and the Commissioners was reckless and wanton, and that the high-speed pursuit policies and training were woefully inadequate. Clearly, then, genuine issues of material fact existed.

Second, the circuit court ignored its own decisions and the decisions of this Court and wrongly usurped the function and province of the jury. The trial court simply chose to believe the self-serving testimony of respondents' witnesses over legitimate inferences from the facts as well as the testimony of the petitioners' witnesses. The court viewed the facts and inferences in the light most

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[8] Deputy Selby testified that he had no idea what speed he was traveling.

favorable to the *respondents*, rather than the petitioners as Rule 56 required.

Indeed the district court ignored—and in fact failed to mention—the testimony of the petitioners' expert witnesses. This aspect of the decisions of the district and circuit courts directly conflicts with the Fourth Circuit's opinion in *Miltier v. Beorn*, 896 F.2d 848 (4th Cir. 1990).

There, the district court ruled that the defendants' actions, although medically negligent, did not rise to the level of deliberate indifference required to sustain an Eighth Amendment violation. The plaintiff's expert had failed to state that the maltreatment constituted anything more than mere negligence. *Id.*, 896 F.2d at 852.

The Fourth Circuit reversed the district court's grant of summary judgment. The court reasoned that the plaintiff was entitled to a reasonable inference that her expert witness would testify that the defendants' conduct rose to the level of deliberate indifference. Moreover, the Fourth Circuit recognized this Court's admonition that once a party "has named a witness to support her claim, summary judgment should not be granted without . . . somehow showing that the named witness' possible testimony raises no genuine issue of material fact." *Id.*, *quoting Celotex v. Catrett*, 477 U.S. 317, 328 (1986) (White, J., concurring). Whether an instance of medical misdiagnosis resulted from deliberate indifference or negligence is a fact question. *Id.*

Here, petitioners' experts testified that the conduct of both Selby and the Commissioners was reckless and wanton and caused Mrs. Temkin's injuries. The respondents failed to offer testimony in rebuttal, although undoubtedly they disagree with the petitioners' experts. Such testimony clearly is a genuine issue of material fact which is appropriate only for a jury to consider.

Moreover, even if the district court was correct in deciding summary judgment under a "shocks the con-

science" standard, the court impermissibly invaded the province of the jury in its decision.

The district court decided, and the Fourth Circuit affirmed, that Selby's conduct did not shock the conscience of the court. Nevertheless, the issue is *not* whether Selby's conduct shocked the trial court, but whether his conduct could shock the conscience of a jury.

The petitioners find it difficult to believe that no jury could construe as shocking the conduct of an officer chasing a misdemeanant at speeds in excess of 100 miles per hour, at night, in a populated area, along a narrow, winding, two-lane road and over a ten-mile area. That Selby had obtained the license plate number and description of the vehicle yet continued the chase is even more evidence of the shocking nature of his conduct. Furthermore, a jury would construe the actions of both officer Selby and an assisting officer, Pauley, as shocking because they ignored Mrs. Temkin's critical needs as she was pinned in her car in order to chase the misdemeanants.

The key indisputable inference from the facts of this case is that Deputy Selby, through his conduct, intentionally placed the public in danger. That Selby continued the chase under such unreasonably hazardous conditions in direct contravention of a clear—albeit inadequate—policy requiring termination of the chase only reinforces the inference that Selby was acting at the expense of the public. The probability that someone would be in the way of his car was great. The good served was, at best, minimal. Under these circumstances, Selby's actions were no different than had he fired a gun at a fleeing suspect in a crowd.

The district court also found that the respondent Commissioners had not acted with deliberate indifference. As with Selby's conduct, the issue is whether a jury could find that the Commissioners' actions constituted deliberate indifference to the due process rights of the petitioners.

The Commissioners did not act in a vacuum. The subject of high-speed police chases causing serious injury and death to innocent citizens is a nationally recognized problem and has been widely discussed in the media. Although the Commissioners were on notice of this serious problem, they wholly abdicated any control and failed to ascertain what, if any, policies and training the Frederick County Sheriff's Department employed with respect to high-speed pursuits. The petitioners' expert witness tesified that the Commissioners' actions were reckless, that the policies and training were wholly deficient and that Selby's actions were directly attributable to the Commissioners' failure to train. Further, the testimony of county employees showed that the county exercised absolutely no control over policies or training. As with Selby's conduct, the petitioners find it difficult to believe that no jury could find the Commissioners to be deliberately indifferent to the rights of innocent motorists, such as Mrs. Temkin, in failing to adopt an adequate policy and training program regarding dangerous high-speed chases.

Under the decisions of this Court and the Fourth Circuit, a jury was entitled to hear the evidence, weigh the credibility of witnesses and make appropriate inferences of fact.

B. The Courts Below Granted Summary Judgment Prematurely Without Affording Petitioners Adequate Time for Discovery.

In addition to usurping the role of the jury, the district and circuit courts, despite petitioners' Rule 56(f) affidavit, failed to permit adequate time for discovery and prematurely decided respondents' motion for summary judgment.

Rule 56(f) permits a trial court to defer ruling on a motion for summary judgment if the party opposing the motion specifies the need for additional discovery. In addition, Rule 56 requires that a court permit adequate

time for discovery. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

Here, the petitioners desired to take the depositions of two defense witnesses as well as submit deposition transcripts to their expert witnesses so the witnesses could finalize and expand their conclusions. The trial court had not ordered discovery closed until well after the due dates for the submissions of the briefs on respondents' motions for summary judgment. Nonetheless, the district court ruled on the respondents' summary judgment motion and consequently did not have all the facts before it.

The Fourth Circuit found that any further discovery would not have been material to the district court's judgment because it would not have shed any additional light on Selby's liability. See p. 17a. Yet, the additional discovery would have allowed petitioners' expert witnesses to finalize and more completely present their expert opinion as to the conduct of Selby and the Commissioners, and may have added additional information relating to such conduct.

Moreover, the Fourth Circuit affirmed the district court's grant of summary judgment as to the Commissioners based on the dismissal of petitioners' claim against Selby. The district court, however, did not employ the same reasoning. Rather, it ruled that no jury could find that the Commissioners acted with deliberate indifference. See p. 33a. Accordingly, the district court made *its* ruling without the benefit of all the facts, as stated in petitioners' Rule 56(f) affidavit.

CONCLUSION

For the foregoing reasons, the petition for certiorari should be granted.

Respectfully submitted,

GRETA C. VAN SUSTEREN
Counsel of Record
JOHN P. COALE
PHILLIP B. ALLEN
MARK A. ALLEN
COALE, ALLEN & VAN SUSTEREN
5335 Wisconsin Avenue, N.W.
Washington, D.C. 20015
(202) 686-6500
Counsel for Petitioners

December 11, 1991

APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 90-1070

SHARON TEMKIN; BRUCE M. TEMKIN,
Plaintiffs-Appellants,

v.

FREDERICK COUNTY COMMISSIONERS;
GLEN MARION SELBY, JR.,
Defendants-Appellees.

Appeal from the United States District Court
for the District of Maryland, at Baltimore
William M. Nickerson, District Judge
(CA-90-1402-WN)

Argued: June 5, 1991

Decided: September 12, 1991

Before PHILLIPS, MURNAGHAN, and SPROUSE, Circuit Judges.

Affirmed by published opinion. Judge Murnaghan wrote the opinion, in which Judge Phillips and Judge Sprouse joined.

COUNSEL

ARGUED: Phillip Bogart Allen, COALE, KANANACK & MURGATROYD, Los Angeles, California, for Appellant, John Michael Quinn, QUINN & McAULIFFE, Rockville, Maryland, for Appellees.

ON BRIEF: John P. Coale, COALE, KANANACK & MURGATROYD, Los Angeles, California, for Appellant. Michael J. McAuliffe, QUINN & McAULIFFE, Rockville, Maryland, for Appellees.

OPINION

MURNAGHAN, Circuit Judge:

Appellant Sharon Temkin was severely injured when the car she was driving was struck by the vehicles of a fleeing misdemeanant and the police officer pursuing him. Temkin and her husband (the Temkins) subsequently brought an action pursuant to 42 U.S.C. § 1983 in the United States District Court for the District of Maryland, against both the driver of the police car, appellee Deputy Sheriff Glen Selby (Selby), and the appellee Frederick County Commissioners (the Commissioners).[1] The complaint also alleged pendent state claims for negligent operation of a motor vehicle, negligent supervision, and loss of consortium.

After considerable discovery, the County moved for summary judgment on the section 1983 counts. The Temkins filed an affidavit in opposition to the summary judgment motion pursuant to Federal Rule of Civil Procedure 56(f), claiming that summary judgment would be inappropriate until the Temkins had conducted further discovery. Nevertheless, the district court granted the County's motion and entered summary judgment in their

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[1] Selby and the Commissioners shall be collectively referred to as "the County" except where clarity necessitates a reference to each individually.

favor on the section 1983 counts, then dismissed the state claims, declining to retain pendent jurisdiction over them.

The Temkins then moved to alter or amend the judgment pursuant to Federal Rule of Civil Procedure 59(e) together with an extension of time within which to file a memorandum in support of the motion to alter or amend. The district court denied both motions. The Temkins appeal from both the entry of summary judgment in the County's favor and from the denial of their motion to alter or amend the judgment.

I.

The facts, taken in the light most favorable to the Temkins, are as follows. At approximately 10:00 p.m. on July 14, 1987, Selby, a Frederick County Deputy Sheriff, observed a car spinning its wheels as it left a Texaco gas station on Route 85 in Frederick County. Selby gave chase with his lights and siren activated. Both cars proceeded along Maryland Route 355 at a high rate of speed. While the chase was in progress, an attendant at the Texaco gas station called 911 to report that approximately $17.00 worth of gas had been stolen. The information was relayed to Selby over his radio.

Both vehicles continued along Route 355 at speeds ranging from 65 to 105 miles per hour. Route 355 is a narrow, two-lane highway traversing an area of varying population. At the time of the chase, a carnival was taking place in the area and cars were parked along both sides of the road. At some point, the pursued vehicle failed to navigate a curve in the road, lost control, crossed over the double yellow line, and struck the car in which Sharon Temkin was driving, causing it to spin in a clockwise direction. Selby immediately "stood on the brakes" in an attempt to stop, which resulted in Selby's car skidding out of control, crossing the double yellow line, and hitting Temkin's car broadside on the driver's side. At the moment of impact, Selby's vehicle was traveling at

approximately 60 miles per hour. As a result of the collision with Selby's cruiser, Temkin suffered severe and permanent injuries.

At the time the chase took place, the Frederick County Sheriff's Department had in force General Order #204, which governed the conduct of officers engaged in pursuits. The order required the "on-duty supervisor" to monitor all pursuits and granted him the authority to halt any pursuit "if warranted." At the time the chase began, the on-duty supervisor was responding to another call. He could not monitor Selby's pursuit because his own radio was inoperative; although he could have monitored the pursuit from the car of the officer accompanying him, he chose not to do so.

On appeal, the Temkins have argued that neither Selby nor the Commissioners were entitled to judgment as a matter of law, and that the district court's entry was premateur in light of the Temkins' Rule 56(f) affidavit opposing summary judgment on the ground that further discovery was necessary.

II.

We review a district court's grant of summary judgment *de novo*, employing the same standards applied by the district court. *Felty v. Graves-Humphreys Co.*, 818 F.2d 1126, 1127-28 (4th Cir. 1987). With Federal Rule of Civil Procedure 56 as our guidepost, we will affirm a grant of summary judgment if, after reviewing the pleadings, depositions, interrogatories, and affidavits, we are satisfied that no genuine issue of material fact exists and that the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56; *Barwick v. Celotex Corp.*, 736 F.2d 946, 958 (4th Cir. 1984). The party moving for summary judgment bears the initial burden of pointing to the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Higgins v. Scherr*, 837 F.2d 155, 157 (4th Cir. 1988). The burden then shifts to the non-moving party to come forward

with facts sufficient to create a triable issue of fact. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986); *White v. Rockingham Radiologists, Ltd.*, 820 F.2d 98, 101 (4th Cir. 1987). Summary judgment may only be entered after "adequate time for discovery." *Celotex*, 477 U.S. at 322.

Turning first to the question of whether Selby was entitled to judgment as a matter of law,[2] Temkin's assertion of error on the point focuses upon the standard of care applied by the district court in determining whether a section 1983 constitutional deprivation on the basis of the "substantive due process" aspects of the Fourteenth Amendment was made out.

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[2] The Temkins have argued in passing that the district court usurped the role of the fact-finder by making, on a summary judgment motion, credibility determinations, by weighing evidence, and by drawing inferences from the facts in a light unfavorable to the non-moving party, with the result of accepting the County's testimony at face value. *See, e.g., Paroline v. Unisys Corp.*, 879 F.2d 100, 109 (4th Cir. 1989), *vacated in part*, 900 F.2d 27 (4th Cir. 1990) (where conflict in inferences to be drawn from a given set of facts exists, summary judgment is inappropriate). Here the Temkins seem to have argued that there existed genuine issues of material fact standing in the way of summary judgment, but they have failed utterly to discuss in their brief what any of those disputed facts are. Our only recourse, then, is to review the record *de novo*, mindful that

> [t]he facts and inferences to be drawn from the facts must be viewed in the light most favorable to the non moving party, and [that] this party is entitled "to have the credibility of [their] evidence as forecast assumed, [their] version of all that is in dispute accepted, [and] all internal conflicts in it resolved favorably to [them]."

Miller v. Leathers, 913 F.2d 1085, 1087 (4th Cir. 1990), *cert. denied*, —— U.S. ——, 111 S.Ct. 1018 (1991) (*quoting Charbonnages de France v. Smith*, 597 F.2d 406, 414 (4th Cir. 1979)). As we shall discuss further, *infra*, the only "fact" over which there may exist a dispute was testimony by one of the Temkins' experts to the effect that Selby's conduct during the chase rose to the level of recklessness. Yet under the applicable standard of care, such a "fact" would not be "material."

The district court below adopted the standard of care set out in *Smith v. Bernier*, 701 F. Supp. 1171 (D. Md. 1988), in which then-district Judge Niemeyer wrote that a section 1983 claim alleging a violation of substantive due process can be made out only when the conduct alleged "shock[s] the judicial conscience," *id.* at 1177, language taken directly from the Supreme Court's opinion in *Rochin v. California*, 342 U.S. 165 (1952). The Temkins have asserted that the district court erred in adopting the "shocks the conscience" standard. We disagree.

It is axiomatic that "in any § 1983 action the initial inquiry must focus on whether the two essential elements of a § 1983 action are present: (1) whether the conduct complained of was committed by a person acting under color of state law; and (2) whether this conduct deprived a person of rights, privileges, or immunities secured by the Constitution or laws of the United States." *Parratt v. Taylor*, 451 U.S. 527, 535 (1981).

When the constitutional deprivation concerns governmental misconduct implicating the guarantees of life, liberty, and property under the Due Process Clause of the Fourteenth Amendment, additional elements come into play. In *Daniels v. Williams*, 474 U.S. 327, 334 (1986), the Supreme Court held that such a deprivation must flow from conduct amounting to more than mere negligence, but reserved the question as to what types of conduct short of intentional acts rose to the level of a constitutional deprivation. *Id.* at 334 n.3. *Daniels* overruled that part of *Parratt v. Taylor* which had suggested that mere negligence was sufficient to make out a claim under section 1983 and the Due Process Clause. The part of *Parratt* that survived *Daniels*, however, continues to set forth an additional consideration: where a claim is made alleging negligent deprivation of property, and where an adequate post-deprivation remedy exists in state law, the requirements of due process are satisfied. *Parratt*, 451 U.S. at 544.

The *Parratt* Court defined "adequacy" by balancing the costs associated with imposing additional procedural safeguards as a constitutional requirement against the probability that the safeguards would reduce significantly the abuse of official power at issue. *Id.* at 542-43 (*citing Ingraham v. Wright*, 430 U.S. 651, 682 (1977)).

Because *Parratt* concerned only conduct characterized as "mere negligence," one troubling question its holding left unanswered was whether the Court had concluded that due process analysis of any official misconduct resulting in a deprivation, no matter what the character of the conduct, was henceforth to be effected in a "strictly procedural" context. Justice Powell in particular was concerned that the majority's analysis had "avoid[ed] entirely the question of whether the Due Process Clause may place substantive limitations on this form of governmental conduct." *Id.* at 553 (Powell, J., concurring).

Such concerns appear to have been substantially alleviated in *Daniels*. Indeed, a fair reading of *Daniels* and its companion case, *Davidson v. Cannon*, 474 U.S. 344 (1986), renders as highly doubtful the position that *Parratt* can be read so broadly as to hold that even intentional or malicious abuses of governmental power do not rise to the level of a violation of due process so long as some adequate state post-deprivation remedy exists. Indeed, the Court later noted there, after citing a long line of cases which "reflects the traditional and commonsense notion that the Due Process Clause, like its forbear in the Magna Carta, was 'intended to secure the individual from the arbitrary exercise of the powers of government,'" *id.* at 331 (citations omitted), that "by barring certain government actions regardless of the fairness of the procedures used to implement them, [the Due Process Clause] serves to prevent governmental power from being 'used for purposes of oppression.'" 474 U.S. 327, 331-32 (1986) (citations omitted). Stated another way, some abuses of governmental power may be so egregious or outrageous that no state post-deprivation remedy can adequately serve to preserve a person's constitutional

guarantees of freedom from such conduct. Thus, conduct which "shocks the conscience," *Rochin*, 342 U.S. at 172, or conduct which "amount[s] to a brutal and inhumane abuse of official power literally shocking to the conscience," *Hall v. Tawney*, 621 F.2d 607, 613 (4th Cir. 1980), violates the substantive guarantees of the Due Process Clause independent of the absence or presence of post-deprivation remedies available through state tort law. *See Daniels*, 474 U.S. at 338 (Stevens, J., concurring).[3]

Thus, the question squarely before us is whether Deputy Selby's or the Commissioners' conduct in the instant case so shocks the conscience as to constitute an abuse of governmental power violative of Sharon Temkin's constitutional liberty interests despite the existence of state tort laws under which that conduct is otherwise clearly actionable.[4]

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[3] Such a rule of law forms one of two branches of the reemergence of substantive due process. The branch at issue here is to be distinguished from a line of cases forming the branch described by Justice Harlan in *Poe v. Ullman*, in which he noted,

> Were due process merely a procedural safeguard it would fail to reach those situations where the deprivation of life, liberty or property was *accomplished by legislation* which by operating in the future could, given even the fairest possible procedure in application to individuals nevertheless destroy the enjoyment of all three.

367 U.S. 497, 541 (1961) (Harlan, J., dissenting) (emphasis added). *See, e.g., Michael H. v. Gerald D.*, 491 U.S. 110 (1989).

[4] As Justice Stevens suggested in his concurring opinion in *Daniels*, any section 1983 claimant not raising a claim under another fundamental right incorporated through the Fourteenth Amendment, or under the theory of substantive due process set out in *Rochin*, may only attack the adequacy of the procedure at issue. 474 U.S. at 337-39 (Stevens, J., concurring). Notably, the Temkins have not asserted that the state process is inadequate. Indeed, they timely filed a state action against the County in a Maryland court, trial having been held in abeyance pending resolution of the instant case in its assertion of section 1983 claims. Assuming, *arguendo*, that Justice Stevens' view is not the current posture of a majority of the Court, and some fourth possibility exists in which no state

Although the jurisprudence of the Fourth Circuit has not heretofore, in definitive fashion, adopted the "shocks the conscience" standard, we have, in addition to *Tawney*, embraced that formulation of the standard in another context. In *Weller v. Department of Social Servs.*, 901 F.2d 387 (4th Cir. 1990), a father had brought a section 1983 action against an agency which had removed his son from the parental home. Judge Chapman wrote that the father had failed to make out a substantive due process claim because, in part, "[i]t does not shock the conscience to hear that defendants removed a child in emergency action from the custody of a parent suspected of abusing him, based upon some evidence of child abuse." *Id.* at 391 (footnote omitted).

By way of comparison, in *Martin v. Gentile*, 849 F.2d 863 (4th Cir. 1988), we examined the substantive due process claim of a pretrial detainee by noting that

> a pretrial detainee makes out a due process violation if he shows "deliberate indifference to serious medical needs."

Id. at 871 (*quoting Estelle v. Gamble*, 429 U.S. 97, 106 (1976)). While the Temkins might urge that we should adopt the "deliberate indifference" standard, the examination of the standard of care owed in the context of incarceration is of limited value for our purposes here. In *Smith v. Bernier*, Judge Niemeyer pointed out that

> "many of the case[s] permitting recovery on a substantive due process ground for personal injury or death involve a person in state custody or under the state's control. Such persons are clearly subject to

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remedy is available, but a substantive due process claim may still be made out on the basis of a deprivation caused by conduct greater than merely negligent, such as "gross negligence" or recklessness, we need not today concern ourselves with such a possibility, because in the presence of a colorable state remedy, Temkin's only available cause of action lies along the line of cases comprising, *inter alia*, *Rochin* and *Tawney*.

> abuses of the government's significant power over them. By contrast, where a member of the public is harmed as a result of a government official's failure to act, a constitutional violation is not generally found . . . unless the government conduct is 'sufficiently severe, sufficiently disproportionate to the need presented and so deliberate and unjustified a use of [authority] as to transcend the bounds of ordinary tort law and establish a deprivation of constitutional rights.' "

701 F. Supp. at 1177 (*quoting McClary v. O'Hare*, 786 F.2d 83, 88 (2d Cir. 1986) (citation omitted)). Indeed, the district court below relied on the *McClary* language in adopting the "shocks the conscience" standard, reasoning we find entirely consistent with our analysis of *Parratt* and *Daniels*.

A review of rulings by other circuits which have examined the substantive due process issue in the context of police driving misconduct only leaves us further convinced of the correctness of the "shocks the conscience" standard. In *Roach v. City of Fredericktown*, 882 F.2d 294 (8th Cir. 1989), plaintiffs who had been seriously injured when their car was struck by both a fleeing suspect's car and the pursuing policeman's car brought a section 1983 claim against the policeman and the city, claiming that the policeman's actions "shocked the conscience." The district court dismissed the action for failure to state a claim. On appeal, the Eighth Circuit ruled that negligent or "grossly negligent" conduct did not state a claim under section 1983 and that the policeman's conduct, not rising to the level of "gross negligence," "most certainly [did] not rise to the level of conduct which would sustain a claim under section 1983." *Id.* at 297.

The Eleventh Circuit came to a similar conclusion in *Cannon v. Taylor*, 782 F.2d 947 (11th Cir. 1986). There a police officer, responding to an emergency call, drove his vehicle within the city limits of Columbus, Georgia at

46 miles per hour in a 30-mile-per-hour zone. Georgia law permitted police vehicles to exceed posted speed limits when responding to emergency calls, but only if the officer used the vehicle's flashing lights and siren. The defendant in *Taylor* was using neither, and struck the left side of the plaintiff's automobile as she was driving through an intersection. Nevertheless, the Eleventh Circuit held that

> a person injured in an automobile accident caused by the negligent, or even grossly negligent, operation of a motor vehicle by a policeman acting in the line of duty has no section 1983 cause of action for violation of a federal right.

Id. at 950. The *Taylor* court's reasoning is particularly persuasive because of its citation to two Supreme Court cases, one of which we have already discussed at length, which held, albeit in *dicta*, that a finding of section 1983 liability for persons involved in nothing more than an automobile accident with a state official would render the Fourteenth Amendment "a font of tort law to be superimposed upon whatever systems may already be administered by the States." *Paul v. Davis*, 424 U.S. 693, 701 (1976); *see also Parrat*, 451 U.S. at 544.

Although the Sixth Circuit adopted a standard perhaps slightly less stringent—"gross negligence and outrageous conduct"—in *Jones v. Sherrill*, 827 F.2d 1102 (6th Cir. 1987), the district court's dismissal of a section 1983 claim brought by a plaintiff whose husband had been killed when his automobile collided with a car which had crossed the centerline in a high-speed police chase was affirmed. In her complaint, the plaintiff alleged that in the course of the pursuit, the vehicles were driven at speeds of 120-125 miles per hour in traffic and within the city limits, that the chasing police cars were following in a manner too close for safety, that the police chief was in radio contact with the officers and was following them in his own vehicle, and that as a result of the

"grossly negligent" pursuit, the fleeing driver's car crossed the centerline and collided with the plaintiff's husband's car, killing him.

The *Sherrill* court defined "gross negligence" in a section 1983 context by stating that

> "a person may be said to act in such a way as to trigger a section 1983 claim if he intentionally does something unreasonable with disregard to a known risk or a risk so obvious that he must be assumed to have been aware of it, and of a magnitude such that it is highly probable that harm will follow;"

id. at 1106 (*quoting Nishiyama v. Dickson County*, 814 F.2d 277, 282 (6th Cir. 1987) (en banc); adding that

> [t]he facts alleged in support of the legal conclusion of gross negligence must be sufficient to charge the government officials with *outrageous conduct or arbitrary use of government power.*

Id. (emphasis added). Finding the facts (facts quite similar to those presented here) not to meet such a standard, the Sixth Circuit affirmed dismissal.

Finally, in *Walton v. Salter*, 547 F.2d 824 (1976), the Fifth Circuit affirmed the dismissal of a section 1983 complaint brought by a widow whose husband had been struck by a police car responding to an armed robbery. The court held that an isolated act of negligence, even if willful and wanton, failed to state a section 1983 claim. *Id.* at 825.

As all of the parties, and the district court as well, point out, our sister circuits have adopted standards of care ranging from "gross negligence" to "deliberate indifference" to "recklessness" for section 1983 substantive due process claims involving conduct other than the driving of official vehicles. *See e.g., Landol-Rivera v. Cruz Cosme*, 906 F.2d 791, 796 (1st Cir. 1990) (officers' decision to shoot toward hijacked vehicle did not demonstrate

reckless or callous indifference); *Wood v. Ostrander*, 879 F.2d 583, 588 (9th Cir. 1989), *cert. denied*, —— U.S. ——, 111 S.Ct. 341 (1990) (impounded vehicle passenger's allegations that state trooper acted with deliberate indifference to passenger's interest in personal safety by leaving passenger by the side of the road at night in a high-crime area, resulting in passenger's accepting ride with stranger and being raped, stated claim under section 1983); *Archie v. City of Racine*, 847 F.2d 1211, 1219 (7th Cir. 1988) (*en banc*), *cert. denied*, 489 U.S. 1056 (1989) (fire department dispatcher's refusal to send rescue squad after two requests by telephone was not reckless in the constitutional sense so as to support a section 1983 action); *Harris v. Maynard*, 843 F.2d 414, 416 (10th Cir. 1988) (wanton or obdurate disregard of, or deliberate indifference to, prisoner's right to life as a condition of confinement is a substantitve constitutional deprivation under the Fourteenth Amendment); *Morales v. Department of Corrections*, 842 F.2d 27, 30 (2d Cir. 1988) (inmate's allegation that corrections officer on duty in dormitory stood by and allowed attack on inmate by fellow inmate to occur was sufficient to state federal rights claim for deliberate indifference under due process clause); *Metzger v. Osbeck*, 841 F.2d 518, 520 n.1 (3d Cir. 1988) (finding that school teacher's conduct in disciplining student amounted to reckless indifference or gross negligence would be sufficient to support section 1983 claim); *Taylor v. Ledbetter*, 818 F.2d 791, 797 (11th Cir. 1987) (*en banc*), *cert. denied*, 489 U.S. 1065 (1989) (child involuntarily placed in foster home may bring section 1983 action for violation of Fourteenth Amendment rights arising out of state officials' deliberate indifference to welfare of child in placing child in foster home); *Lopez v. Houston Indep. School Dist.*, 817 F.2d 351, 355 (5th Cir. 1987) (supervisors of school bus driven were not grossly negligent or deliberately indifferent to constitutional rights of students riding bus and were thus not liable under section 1983).

In the abstract, the weight of such authority might counsel for our own adoption of some similar standard. Yet, when the "chase cases" involving the police—*Roach*, *Taylor*, *Sherrill*, and *Walton*—are considered together with the "shock the conscience standard" derived from *Rochin*, *Parratt*, and *Daniels* and alluded to if not indeed embraced, in two Fourth Circuit opinions, *Weller* and *Tawney*, and are considered in light of the "stricter standard" rationale discussed in *McClary*, we can only conclude that the standard of care applicable to the instant facts is the "shocks the conscience" standard.[5]

Turning to the instant facts, and reserving for the moment consideration of any additional facts which may have developed had further discovery been permitted; *see* part III, *infra*; the Temkins have called our attention to five specific facts which they have contended would demonstrate that Selby's conduct was violative of the applicable standard of care: 1) the chase continued for a signifiant period of time over a ten mile area; 2) the chase continued at a very high rate of speed; 3) the chase was initiated because of a minor violation; 4) the police already had, at a minimum, a partial identification of the license plate of the suspect vehicle; and 5) the chase violated General Order #204 because Selby failed to maintain radio contact with his supervisor throughout. To those five facts we would add the expert deposition testimony of Dr. Geoffrey Alpert that Selby's conduct was "reckless," "totally irresponsible," and "wanton."[6]

With the exception of the fact that the instant chase took place at night, the facts here are almost indistin-

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[5] In so holding, we do not today address the question of whether the same standard applies in those cases, such as incarceration or involuntary foster care, where governmental control over the claimant is intentional and direct. *See, e.g., Martin*, 849 F.2d at 871; *Ledbetter*, 818 F.2d at 797.

[6] No mention is made of Dr. Alpert's testimony in the district court's memorandum opinion.

guishable from those found in *Roach*, *Taylor*, *Sherrill*, and *Walton*. Indeed, some of the facts in those four cases involved conduct more egregious than that present here. We are thus of the opinion that Selby's conduct, while disturbing and lacking in judgment, falls short of the "shocks the conscience" standard we adopt today. The district court properly held that Selby's conduct did not rise to the level of a violation of substantive due process cognizable under a section 1983 claim.

As to the Frederick County Commissioners, count two of the Temkin's complaint alleges that the Commissioners had failed to adopt adequate policies governing the training and supervision of officers engaged in high-speed pursuits. Such failure, the complaint continues, "made it inevitable that life-threatening collisions would occur, and amounted to a deliberate indifference to the rights of those using the public highways." In addition, the complaint avers that "[o]ther high-speed chases have been undertaken by deputies of the Frederick County Sheriff's Department with such frequency and with such little provocation that it can be fairly concluded that the Defendant Commissioners have a custom and practice of encouraging such cases for the sake of apprehending suspects, however minor the violation, at the expense of the safety and well-being of the innocent public." The Temkins have now contended on appeal that the district court erred in entering summary judgment in favor of the Commissioners.

We need not linger long on the point. A claim of inadequate training under section 1983 cannot be made out against a supervisory authority absent a finding of a constitutional violation on the part of the person being supervised. *Belcher v. Oliver*, 898 F.2d 32, 36 (4th Cir. 1990); *Roach*, 882 F.2d at 298. Because of a lack of section 1983 liability on Selby's part, the entry of summary judgment in the Commissioners' favor was proper.

III.

The Temkins have raised as a final point of error the district court's entry of summary judgment in the County's favor even in light of an affidavit filed in opposition to summary judgment pursuant to Federal Rule of Civil Procedure 56(f), urging that further discovery was required and that such discovery would present genuine issues of material fact rendering summary judgment inappropriate. Specifically, the affidavit averred that

> Plaintiffs desire to take the depositions of one of the Frederick County Commissioners and of Lt. Gary Wood of the Frederick County Sheriffs Department. The deposition of the Frederick County Commissioner will establish that Frederick County owned the police vehicle in question (although this has been admitted in answers to interrogatories[)]. The deposition will further establish that the Frederick County Commissioners had no policy regarding police pursuits and that the Frederick County Commissioners, in fact, abrogated that responsibility completely. Finally, the deposition will establish facts relating to the relationship between the Commissioners and the Sheriffs Department.
>
> The deposition of Lt. Gary Wood, who was the training officer for the Frederick County Sheriffs Department, will establish the absence of training by the Frederick County Sheriffs Department in the procedures under General Order #204.

The document is undated and does not appear on the district court's docket sheet, but it is apparent from the face of the affidavit that it was filed before the court granted the County's motion for summary judgment.

After the entry of summary judgment, the Temkins filed a motion to alter or amend the judgment under Federal Rule of Civil Procedure 59(e). That motion was denied. Presumably, the motion had been filed to permit the discovery alluded to in the Rule 56(f) affidavit to

go forward, because the Temkins have stated in their brief that in light of the fact that discovery was not concluded, the district court "should have deferred ruling or granted Plaintiffs' motion to reconsider."

We review denials of Rule 59(e) motions under an abuse of discretion standard. *Boryan v. United States*, 884 F.2d 767, 771 (4th Cir. 1989). The primary question raised by the district court's entry of summary judgment in the face of the Temkins' Rule 56(f) motion and its subsequent denial of the Rule 59(e) motion is whether the evidence produced by further discovery would have created a genuine issue of material fact or would have led the court to conclude that, viewing the evidence in a light most favorable to the Temkins, a jury might reasonably conclude that Deputy Sheriff Selby's conduct met the "shocks the conscience" standard.

The Supreme Court has noted that once a plaintiff "has named a witness to support her claim, summary judgment should not be granted without . . . somehow showing that the named witness' possible testimony raises no genuine issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 328 (1986) (White J., concurring). Yet because, as discussed in part II, *supra*, the necessary predicate for a finding of liability on the part of the Commissioners is absent, any further evidence developed through the depositions the Temkins sought to include in the record would have been immaterial to the court's judgment, because it would not have shed any additional light on Selby's liability. *Cf. Miltier v. Beorn*, 896 F.2d 848, 852-53 (4th Cir. 1990) (inferences drawn from depositions of experts created genuine issue of material fact as to whether standard of care had been met, rendering summary judgment improper). It would seem clear, then, that the district court did not abuse its discretion in denying the Temkins' Rule 59(e) motion.

For all of the foregoing reasons, the judgment of the district court is

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

WN-89-1402

SHARON TEMKIN *et al.*

v.

FREDERICK COUNTY COMMISSIONERS *et al.*

MEMORANDUM

[Filed Jul. 2, 1990]

On July 14, 1987, at approximately 10:00 p.m., plaintiff Sharon K. Temkin ("Temkin") was proceeding in her automobile in a northerly direction on Route 355 (Urbana Pike) near its intersection with Tyler Place, in Frederick County, Maryland. Near the same time, Richard W. King ("King"), after allegedly stealing gasoline, quickly exited a Texaco gas station located on Market Street in Frederick, Maryland causing his tires to squeal. Defendant Deputy Sheriff Glenn M. Selby ("Selby"), who was on patrol in a parking lot adjacent to the Texaco station, witnessed King's quick retreat and began to pursue him southbound on Route 355. The chase continued with both vehicles reaching speeds in excess of 100 m.p.h. After traveling approximately ten miles, King lost control of his car while attempting to maneuver a curve and struck Temkin's vehicle in the right front side. Temkin's car spun out of control in a clockwise direction and Selby's police cruiser hit her broadside along the driver's door. Temkin was seriously injured.

On May 10, 1989, Temkin, along with her husband, Bruce M. Temkin, filed the instant five count complaint asserting that Selby's actions violated her civil rights and also filed several pendent state law negligence claims. Named as defendants are Selby and the Frederick County Commissioners ("Commissioners") who are alleged to be responsible for the maintenance and supervision of the Frederick County Sheriff's Department. Presently pending before the Court are several motions.[1] Since this entire matter can be resolved with the disposition of the defendants' motion for summary judgment (Paper Number 9), this Court shall not address the remaining motions. Having carefully considered the briefs and exhibits attached thereto, this Court finds that no hearing is necessary. Local Rule 105.6. For the reasons stated below, defendants' motion for summary judgment shall be granted.

I. SUMMARY JUDGMENT STANDARDS

The standard applicable to motions for summary judgment is clear. Under Federal Rule of Civil Procedure 56, to grant a motion for summary judgment, the Court must find that the pleadings, together with the depositions, interrogatories and affidavits on file, establish that there is no genuine issue of material fact and that the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56; *Barwick v. Celotex Corp.*, 736 F.2d 946, 958 (4th Cir. 1984); *Purity Products, Inc. v. Tropicana Products, Inc.*, 703 F. Supp. 564, 567 (D. Md.), *aff'd.*, 887 F.2d 1081 (4th Cir. 1988); *Pfeifer v. Lever Bros.*, 693 F. Supp. 358, 362 (D. Md. 1987), *aff'd.*, 850 F.2d 689 (4th Cir. 1988). A party seeking summary judgment bears the initial burden of specifying the basis upon which it contends judgment should be granted and of identify-

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[1] In addition to a summary judgment motion (Paper Number 9), the defendants filed three motions for partial summary judgment and a motion to dismiss. (Paper Numbers 10-13). Each motion is opposed. (Paper Numbers 15-19).

ing that portion of the record which, in its opinion, demonstrates the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 2552 (1986); *Charbonnages de France v. Smith*, 597 F.2d 406, 414 (4th Cir. 1979). The non-moving party must thereafter produce specific facts demonstrating a genuine issue of fact for trial. *Anderson v. Liberty Lobby Inc.*, 477 U.S. 242, 247-48, 106 S.Ct. 2505, 2509-10 (1986); *White v. Rockingham Radiologists Ltd.*, 820 F.2d 98, 101 (4th Cir. 1987).

The Supreme Court has emphasized that Rule 56 mandates the entry of summary judgment "after adequate time for discovery . . . against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case and on which that party will bear the burden of proof at trial." *Celotex*, 477 U.S. at 322, 106 S.Ct. at 2552. Thus, "the inquiry performed is the threshold inquiry of determining whether there is the need for a trial—whether, in other words, there are any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." *Anderson*, 477 U.S. at 250, 106 S.Ct. 2509-10. In making that analysis, the evidence and all justifiable inferences therefrom must be viewed in the light most favorable to the non-moving party. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 158-59, 90 S.Ct. 1598, 1609 (1970); *Gill v. Rollins Protective Service Co.*, 773 F.2d 592, 595 (4th Cir.), *reh'g. denied*, 722 F.2d 1042 (1985).

The Supreme Court explained the summary judgment standard by stating:

> [T]he judge must ask himself not whether he thinks the evidence unmistakably favors one side or the other but whether a fair-minded jury could return a verdict for the plaintiff on the evidence presented. The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient;

> there must be evidence on which the jury could reasonably find for the plaintiff.

Anderson, 477 U.S. at 252, 106 S.Ct. at 2512; *Pfeifer*, 693 F. Supp. at 362. The Fourth Circuit has recognized that trial judges have "an affirmative obligation . . . to prevent 'factually unsupported claims and defenses' from proceeding to trial". *Felty v. Graves-Humphreys Co.*, 818 F.2d 1126, 1128 (4th Cir. 1987) (citing *Celotex*, 477 U.S. at 323-25, 106 S.Ct. at 2553). Applying these principles to the facts of record in this case, this Court concludes that defendants' motion for summary judgment must be granted.

II. MERITS

Counts one and two of the complaint state a cause of action under 42 U.S.C. § 1983 against Selby, individually, and the County Commissioners, respectively. The defendants have moved for summary judgment on both counts. The potential liability under § 1983 of Selby and the Commissioners shall be addressed separately.

1. *Deputy Sheriff Selby*

Count I alleges that Selby engaged in the high-speed chase of King without proper training and operated his police cruiser in a maner that was "reckless [and] grossly negligent". Selby's operation of the cruiser, the complaint alleges, was done in wanton and wilful disregard of Temkin's Fourteenth Amendment rights in deprivation of life, libery and property without due process of law.[2] Count I seeks to impose personal liability on Selby.

Suits attempting to impose personal liability upon government officials acting in their individual capacities seek to remedy acts taken under the color of state law.

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[2] The Court notes that Temkin fails to distinguish which "constitutional right" she was deprived of. This fact, however, does not prevent the Court from deciding this motion.

Allen v. Cook, 668 F. Supp. 1460, 1461 (W.D. Okl. 1987) *citing Scheuer v. Rhoades*, 416 U.S. 232, 237-38, 94 S.Ct. 1683 (1974). A plaintiff must make a prima facie showing of two elements to establish individual liability under § 1983: (1) that the act or omission deprived plaintiff of a right, privilege or immunity secured by the Constitution or laws of the United States, and (2) that the act or omission was done by a person acting under color of state law. *Allen*, 668 F. Supp. at 1463, *citing Parratt v. Taylor*, 451 U.S. 527, 535, 101 S.Ct. 1908 (1981); *Norton v. Liddel*, 620 F.2d 1375, 1378-79 (10th Cir. 1980). There is no dispute that Selby's acts in chasing King were done in his capacity as a deputy sheriff of Frederick County. The issue, therefore, is whether Selby's conduct deprived Temkin of her civil rights without due process.

The *Allen* Court noted that "[t]o guard against making the 14th Amendment 'a font of tort law to be superimposed upon whatever systems may already be administered by the states,' *Paul v. Davis*, 424 U.S. 693, 701, 96 S. Ct. 1155 (1976), the United States Supreme Court has held the Due Process Clause is not implicated by a state official's *negligent* act causing unintended loss of, or injury to, life, liberty, or property." *Allen*, 668 F. Supp. at 1463. The Supreme Court in *Daniels v. Williams*, 474 U.S. 327, 106 S.Ct. 662 (1986) and *Davidson v. Cannon*, 474 U.S. 344, 106 S.Ct. 668 (1986) later reiterated this principal.[3] Thus, "negligent" acts committed by police officers in the course of their duties give rise only to state law tort claims.[4] *Allen*, 668 F. Supp. at

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[3] *Daniels* and *Davidson* establish that under the due process clause of the Fourteenth Amendment no constitutional deprivation occurs as a result of the negligent acts of prison officials. Thus, mere negligence does not constitute a deprivation in the constitutional sense. *Daniels*, 474 U.S. 330-336, 106 S.Ct. at 664-67; *Davidson*, 474 U.S. at 348, 106 S.Ct. at 670-71.

[4] Several courts have dismissed § 1983 actions which involved traffic accidents caused by police officers. *See e.g. Cannon v. Taylor*,

1464. Judge Paul V. Niemeyer of this Court recognized this rule in *Smith v. Bernier*, 701 F. Supp. 1171, 1176 (D. Mr. 1988) ("As such, th[e] complaint fail[s] to state a claim under 42 U.S.C. § 1983 because 'the Due Process Clause is simply not implicated by a *negligent* act of an official causing unintended loss or injury to life, liberty, or property.'") *citing Daniels*, 474 U.S. at 328. Judge Niemeyer, however, stated:

> The Supreme Court in *Daniels* expressly left open the question whether something less than intentional conduct, such as recklessness or gross negligence, is enough to trigger the protection of the Due Process Clause.

Smith, 701 F. Supp. at 1176. Judge Niemeyer continued to examine the issue of what is the appropriate standard beyond mere negligence for measuring whether a violation of due process has occurred. Finding that the allegations at issue involved a claim of "substantive due process", the *Smith* court concluded:

> *Rochin* . . . identifies the traditional standard for determining whether a substantive due process violation occurred by asking whether the conduct '*shocks the conscience*' . . . It is clear that substantive due process violations must be more serious than mere violations of state tort law. 'Our Constitution deals with the large concerns of the government and the governd, but it does not purport to supplant tradi-

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782 F.2d 947, 950 (11th Cir. 1986) (Accident resulting from police officer's response to an emergency call. The Court stated, "We hold that a person injured in an automobile accident caused by the negligent, or even grossly negligent, operation of a motor vehicle by a policeman acting in the line of duty has no section 1983 cause of action for violation of a federal right"); *Walton v. Salter*, 547 F.2d 824, 825 (5th Cir. 1976) (Police officer responding to an armed robbery call struck and killed a pedestraian); *Apodaca v. Rio Arriba County Sheriff's Dep't*, 647 F. Supp. 752, 754 (D.N.M. 1986) (Police officer responding to a burglar alarm struck plaintiff's car killing her).

> tional tort law in laying down rules of conduct to regulate liability for injuries that attend living together in society.'

Smith, 701 F. Supp. at 1177 (emphasis supplied) *citing Rochin v. California*, 342 U.S. 165, 72 S.Ct. 205 (1952); *Gilmere v. City of Atlanta, Georgia*, 774 F.2d 1495, 1500 (11th Cir. 1985), *cert. denied*, 476 U.S. 1115 (1986). Judge Niemeyer continued, quoting *McCary v. O'Hare*, 786 F.2d 83, 88 (2nd Cir. 1986):

> [M]any of the case[s] permiting recovery on a substantive due process ground for personal injury or death involve a person in state custody or under the state's control. Such persons are clearly subject to abuses of the government's significant power over them. By contrast, where a member of the public is harmed as a result of a governmental official's failure to act, a constitutional violation is not generally found . . . unless the government conduct is *sufficiently severe, sufficiently disproportionate to the need presented and so deliberate and unjustified a use of [authority] as to transcend the bounds of ordinary tort law and establish a deprivation of constitutional rights.*'

Id. quoting Shillingford v. Holmes, 634 F.2d 263, 266 (5th Cir. 1981). This "shocks the conscience" standard requires proof of conduct beyond negligence, or even gross negligence, but short of "intentional" conduct.[5] The

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[5] The parties have pointed out that as an alternative to the "shocks the conscience" standard, other circuits employ "gross negligence" or "deliberate indifference" standards. *See e.g. Morales v. Department of Corrections*, 842 F.2d 27 (2nd Cir. 1988) ("[D]eliberate indifference to the consequences of [a defendant's] conduct . . . may support a claim under § 1983); *Metzger v. Osbeck*, 841 F.2d 518, 520 n.1 (3rd Cir. 1988) (requiring proof of "intentional conduct, gross negligence, or reckless indifference"); *Archie v. City of Racine*, 847 F.2d 1211 (7th Cir. 1988), *cert. denied*, 109 S.Ct. 1338 (1989) (employing a "reckless" standard); *Harris v.*

Fourth Circuit Court of Appeals has not addressed this specific issue. This Court, however, shall apply the standard set forth in *Smith*.

Temkin's § 1983 claim sets forth allegations of substantive due process violations.[6] As such, Temkin bears the burden of demonstrating sufficient facts that may allow a reasonable jury to conclude that Selby's actions "shock the conscience" or were "sufficiently severe" to transcend the bounds of ordinary tort law. Plaintiff points to several facts that she contends creates a genuine issue of material fact over whether Selby's actions rise to an actionable § 1983 claim. Specifically, Temkin argues that: (1) the chase continued for a significant period of time over a ten mile area; (2) the pursuit continued at very high rate of speed; (3) the chase occurred at night and in a populated area; (4) the chase was initiated due to a *minor* traffic violation; and (5) the chase violated the Frederick County Sheriff's Office general order (Number 204) concerning police pursuits. Opposition at 8 (Paper Number 15). Construing these "facts" in a light most favorable to Temkin, this Court finds that no reason-

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Maynard, 843 F.2d 414, 416 (10th Cir. 1988) (employing a "wanton or obdurate disregard of or deliberate indifference" to civil rights standard); *Lopez v. Houston Independent School District*, 817 F.2d 351, 355 (5th Cir. 1987) (employing a "callous indifference" standard); *Jones v. Sherrill*, 827 F.2d 1102, 1106 (6th Cir. 1987) (employing a "gross negligence" standard; the Court stated, "a person may be said to act in such a way as to trigger a section 1983 claim if he intentionally does something unreasonable with disregard to a known risk or a risk so obvious that he must be assumed to have been aware of it, and of a magnitude such that it is highly probable that harm will follow"); *Taylor v. Ledbetter*, 818 F.2d 791, 795-96 (11th Cir. 1987), *cert. denied*, 109 S.Ct. 1337 (1989) (employing a deliberate indifference standard).

[6] There can be no claim by Temkin that a "procedural due process" violation occurred in this case. As Judge Niemeyer stated, "[i]t is difficult to understand what type of pre-deprivation process the plaintiffs allege was due to [them] . . . prior to the accident in this case." *Smith*, 701 F. Supp. 1176.

able jury could conclude that Selby's actions "shock the conscience", in the context of a colorable § 1983 violation.

Selby testified at deposition that as he was on patrol in the FSK Mall he initially observed King "spinning his wheels" as he was exiting an adjacent gas station. Selby engaged King in pursuit and King failed to stop. A few moments into the chase, Selby radioed his dispatchers several times informing them of his positions and the subject's failure to stop. At that time, Selby considered Kings' driving to be "erratic and reckless." King had caused several vehicles to swerve out of his path as he was alternating between the north and southbound lanes. Selby testified that he continued the chase because of King's driving behavior and because his dispatchers had informed him that King was suspected of robbing the gas station. In his mind, Selby was pursuing a dangerous and unpredictable criminal. The accident, Selby testified, occurred when Temkin's car "rolled out" of a "debris cloud" caused by King's impact with the plaintiff's car. Selby tried to avoid Temkin's car by "standing" on his brakes and attempting to drive up an embankment into a chain-link fence. Immediately before impact, Selby estimates his speed to have been approximately 75 m.p.h. Based on the accident reconstruction report generated by Deputy First Class Frederick A. Anderson of the County Sheriff's Department, Selby's speed at impact, following his efforts to brake, was between 27 and 32 m.p.h. Opposition, Exhibit D (Paper Number 15).

Whether Selby should have disengaged from the chase or not is not the issue here. The critical question to be decided is whether the fact that Selby continued the chase, despite the facts as presented by the plaintiff, amounts to acts that "shock the conscience". This Court finds that the facts construed in Temkin's favor, do not amount to a § 1983 violation. Selby's actions were not "sufficiently severe" nor "sufficiently disproportionate to the need presented". The deputy testified that he felt it was more

prudent to continue to pursue King with his emergency equipment engaged to warn oncoming traffic rather than to allow King to continue unfettered with his reckless and erratic driving. The fact that the speed of the cars reached over 80 m.p.h. does not suggest any deliberate intent by Selby to harm others. Selby was attempting to keep a sufficient pace with King to warn other oncoming vehicles. Temkin's reliance on Selby's alleged violation of the Sheriff's general order governing police pursuits does not create an issue of fact. Although the general order stresses "safety first", any deputy engaged in a pursuit has "discretion" to continue the chase.[7] The record in this case does not indicate that Selby abused his discretion. Furthermore, Selby's actions were not "so deliberate and unjustified a use of authority as to transcend the bounds of ordinary tort law". A jury could perhaps find Selby's actions to be negligent considering the circumstances. This Court, however, finds that his election to continue the pursuit of King does not transcend the barrier between negligence and conduct that shocks the conscience. Therefore, summary judgment as to Count I of the complaint shall be granted.

2. *Frederick County Commissioners*

Count II asserts that the Commissioners failed to adopt adequate policies governing the training and supervision of officers engaged in high-speed pursuits. This alleged failure to train "made it inevitable that life-threatening collisions would occur, and amounted to a *deliberate indifference* to the rights of those using the public highways". Complaint at 6 (Paper Number 1) (emphasis supplied). Additionally, the complaint alleges, "[o]ther

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[7] Section II(D) of general order 204 states, "[T]he discretion whether or not to engage in a pursuit rests with the individual deputy." Motion for Summary Judgment, Exhibit C (Paper Number 9). The order does require a "supervisor" monitoring of the chase.

high-speed chases have been undertaken by deputies of the Frederick County Sheriff's Department with such frequency and with such little provocation that it can be fairly concluded that the Defendant Commissioners have a *custom and practice* of encouraging such chases for the sake of apprehending suspects, however minor the violation, at the expense of the safety and well-being of the innocent public . . ." [8] *Id.* The Commissioners are alleged to own the police cruisers utilized by the deputy sheriffs and, therefore, plaintiffs contend, they negligently abrogated their duty to ensure that the cruisers are properly operated.

In moving for summary judgment, the Commissioners contend they are not liable under any § 1983 theory since Deputy Selby is not a County employee.[9] The issue, however, of Selby's employment, for the purposes of this motion, is irrelevant. Assuming, *arguendo*, that Selby is an employee of the County, plaintiffs fail to demonstrate any genuine issue of material fact preventing summary judgment on the § 1983 claim against the Commissioners.

The definitive case involving the standards applicable to "failure to train" cases under § 1983 is *City of Canton v. Harris*, 489 U.S. 378, 109 S.Ct. 1197 (1989). Prior to *City of Canton*, the Supreme Court recognized that a municipality may be found liable under § 1983 only where the municipality itself causes the constitutional violation. *Id.*, 109 S.Ct. at 1203 *citing Monell v. New York City Dept. of Social Services*, 436 U.S. 658, 98 S.Ct. 2018

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[8] The Court notes that Temkin failed to produce any evidence on this allegation.

[9] In support of their contention, the Commissioners cite *Rucker v. Harford County*, 316 Md. 275, 558 A.2d 399 (1989). In *Rucker*, the Court of Appeals of Maryland, in response to a certified question of law from this Court, held that, under Maryland law, county sheriffs are considered state employees. The Court, however, answered this questioned only upon consideration of Maryland law and specifically stated that the it was not answering the question under federal law. *Rucker*, 316 Md. at 280-281, 558 A.2d at 401.

(1978). Thus, "it is only when the 'execution of the government's *policy or custom* . . . inflicts the injury' that the municipality may be held liable under § 1983." *City of Canton*, 109 S.Ct. at 1203 (emphasis supplied) *citing Springfield, Mass. v. Kibbe*, 480 U.S. 257, 267, 107 S.Ct. 1114, 1120 (1987). In order for municipal liability to attach, there must be "a direct causal link between [the] municipal policy or custom, and the alleged constitutional deprivation". *City of Canton*, 109 S.Ct. at 1203.

Where the basis of the alleged policy or custom is said to be a "failure to train", the Court held that a plaintiff must demonstrate that the inadequacy of police training amounts to a "*deliberate indifference* to the rights of persons with whom the police come into contact." *Id.* (emphasis supplied). The Court stated:

> Only where a municipality's failure to train its employees in a relevant respect evidences a 'deliberate indifference' to the rights of its inhabitants can such a shortcoming be properly thought of as a city 'policy or custom' that is actionable under § 1983. As Justice Brennan's opinion in *Pembaur v. Cincinnati*, . . . put it: '[M]unicipal liability under § 1983 attaches where —and only where—a deliberate choice to follow a course of action is made from among various alternatives' by city policy makers.

Id. quoting Pembaur v. Cincinnati, 475 U.S. 469, 483-84, 106 S.Ct. 1292, 1300 (1986). The Court cautioned, however, that the mere allegation that an existing training program amounts to a "policy" will not automatically satisfy the requirement of § 1983. The focus "must be on [the] adequacy of the training program in relation to the tasks the particular officer must perform." *City of Canton*, 109 S.Ct. at 1205-06. The fact that a particular officer may be unsatisfactorily trained does not create liability, "for the officer's individual shortcomings may have resulted from factors other than a faulty training program." *Id.* Furthermore, "adequately trained officers

occasionally make mistakes; the fact that they do says little about the training program or the legal basis for holding the city liable". *Id.*

In this case, Temkin alleges that the "custom or policy" adopted by the Commissioners, which resulted in the deprivation of her civil rights by Selby, is the absence of *any* training program sponsored, controlled or directed by the Commissioners. Temkin apparently reasons that the need for training of the County sheriff and his deputy *by* the Commissioners was so obvious and that the failure to do so was so likely to result in the violation of constitutional rights, that the Commissioners can reasonably be said to have been deliberately indifferent to the need for training. The complaint alleges that in addition to the police chase at issue in this case, other chases have occurred which made the possibility of injury very likely. Thus, the failure to train represents a policy under *Monnel.*

After a careful review of the record, this Court concludes that no reasonable jury could find that the Commissioners acted with "deliberate indifference" to Temkin's constitutional rights when they failed to adopt a training program. The evidence reflects the contrary. All police officers in the State of Maryland, prior to their employment by any subdivision, are required to be certified by the Police Training Commission ("Training Commission") of the Department of Public Safety and Correctional Services. Md. Ann. Code art. 41, § 4-201(f) (1986 Supp. 1989). The certification entails the completion of various training programs directed by the Training Commission. A portion of the training program includes instruction on the proper procedures in conducting police chases. All Frederick County deputy sheriffs are required to complete this training. In addition to the formal training directed by the State of Maryland, the Frederick County Sheriff's office adopted a specific general order governing police chases. All deputies have knowledge of the order and are expected to follow its directives. Deputy Selby testified that he received training in police

chase procedures from the Metropolitan Training Academy in the District of Columbia. This training satisfied Maryland's requirements. Md. Ann. Code art. 41 § 4-201(d)(6)(ii) (1986 Supp. 1989). In addition to his formal training, Selby admitted that he had knowledge of the directives of General Order 204. This training can fairly be said to be adequate in relation to the need presented. Temkin fails to articulate any additional procedure or program that the Commissioners could have employed that would have enhanced the training of the Frederick County sheriff's office. Furthermore, even assuming that Selby's actions could be characterized as negligent, his actions cannot not with all certainty said to have resulted directly from the Commissioner's failure to train him. No causal link between Temkin's alleged constitutional injuries and Selby's action has been demonstrated. At best, Temkin can possibly prove that Selby's acts were a "mistake". This, however, does not sufficiently demonstrate facts actionable under § 1983. Viewing the record as a whole, the facts do not demonstrate any "deliberate indifference" by the Commissioners to the need for training in police chases. Therefore, no genuine issue of fact remains in dispute on Temkin's § 1983 claim again the Commissioners. Accordingly, summary judgment shall be granted as to Count II.

3. *Remaining pendent state claims*

Since the § 1983 actions in this case are not viable, this Court must decide whether to exercise pendent jurisdiction over the negligence counts (Counts 3-5). The issue of whether a federal court should continue to exercise jurisdiction over state law claims where the basis of federal jurisdiction has been dismissed was first addressed by the Supreme Court in *United Mine Workers of America v. Gibbs*, 383 U.S. 715 (1966). As the *Gibbs* Court cautioned, "pendent jurisdiction is a doctrine of *discretion*, not of plaintiff's right". *Id.* at 726 (emphasis supplied). Justice Brennan, writing for the Court in *Gibbs*, stated:

> Needless decisions of state law should be avoided both as a matter of comity and to promote justice between the parties, by procuring for them a surer-footed reading of applicable law. *Certainly, if the federal claims are dismissed before trial, even though not insubstantial in the jurisdictional sense, the state claims should be dismissed as well.*"

Id. (emphasis supplied). The statement of Justice Brennan has been literally applied by several courts, including the Fourth Circuit. *See e.g.*, 13B C. Wright, A. Miller & E. Cooper, *Federal Practice & Procedure* 2d § 3567.1 at 122-37 (1984 Supp. 1989) (and cases cited therein); *Ancarrow v. City of Richmond*, 600 F.2d 443, 448, n. 5 (4th Cir.), *cert. denied*, 444 U.S. 992 (1979); *O'Hara v. Kovens*, 473 F. Supp. 1161, 1167 (D.Md. 1979) (Young, J.), *aff'd*, 625 F.2d 15 (4th Cir. 1980), *cert. denied*, 449 U.S. 1124 (1981). The *Gibbs* Court recognized that the factors to be considered in exercising the Court's discretion include "judicial economy, convenience and fairness to litigants". *Gibbs*, 383 U.S. at 726. Other factors which courts have considered is the effect of a possible bar to subsequent suit due to a statute of limitations problem. *Hector*, 558 F. Supp. at 207; *see also* 13 B. C. Wright, A. Miller & E. Cooper at 127-32 n. 17. This Court, weighing the various factors, declines to exercise continued jurisdiction.

III. CONCLUSION

For the reasons stated above, defendants' motion for summary judgment shall be granted. A separate order shall be entered.

/s/ William M. Nickerson
WILLIAM M. NICKERSON
United States District Judge

Dated: July 2, 1990.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

WN-89-1402

SHARON TEMKIN, *et al.*

v.

FREDERICK COUNTY COMMISSIONERS, *et al.*

ORDER

[Filed Jul. 2, 1990]

In accordance with the foregoing Memorandum and for the reasons stated therein, IT IS this 2nd day of July, 1990, by the United States District Court for the District of Maryland, ORDERED:

1. That defendants' motion for summary judgment is GRANTED;

2. That judgment is entered in favor of defendant GLENN M. SELBY and defendant FREDERICK COUNTY COMMISSIONERS and against plaintiffs SHARON TEMKIN and BRUCE M. TEMKIN;

3. That this case shall be entered as closed;

4. That the Clerk of Court shall mail copies of the foregoing Memorandum and this Order to all counsel of record.

/s/ William M. Nickerson
WILLIAM M. NICKERSON
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civil Case No. N-89-1402

SHARON TEMKIN, *et al.*,
Plaintiffs,

v.

FREDERICK COUNTY COMMISSIONERS, *et al.*,
Defendants.

RULE 56(F) AFFIDAVIT OF
PHILLIP B. ALLEN, ESQ.

PHILLIP B. ALLEN, ESQ., being first duly sworn for his Rule 56(F) affidavit states:

1. He is counsel of record in the above matter and has knowledge of the facts contained herein.

2. The Defendants have moved for summary judgment on various grounds.

3. Counsel has been unable to obtain facts essential to justify the entirety of our opposition to the Defendants' Motions for Summary Judgment because discovery is on-going.

4. Specifically, Plaintiffs desire to take the depositions of one of the Frederick County Commissioners and of Lt. Gary Wood of the Frederick County Sheriffs Department. The deposition of the Frederick County Commissioner will establish that Frederick County owned the police vehicle in question (although this has been admitted in answers to interrogatories. The deposition will further establish that the Frederick County Commissioners had no policy regarding police pursuits and that the Frederick County

Commissioners, in fact, abrogated that responsibility completely. Finally, the deposition will establish facts relating to the relationship between the Commissioners and the Sheriffs Department.

5. The deposition of Lt. Gary Wood, who was the training officer for the Frederick County Sheriffs Department, will establish the absence of training by the Frederick County Sheriffs Department in the procedures under General Order # 204.

6. After these depositions are transcribed, the counsel for Plaintiffs must send these to Geoffrey Alpert, who is one of the Plaintiffs' experts. At that time Dr. Alpert will be in a position to render his final opinion regarding whether or not the chase, taking into consideration all of the facts, was reckless.

/s/ Phillip B. Allen, Esq.
PHILLIP B. ALLEN, ESQ.

SUBSCRIBED AND SWORN TO before me on this — day of April, 1990.

_____
Notary Public
State of California

My commission expires:

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civil Case No. WN-89-1402

SHARON TEMKIN, *et al.*,
Plaintiffs,

v.

FREDERICK COUNTY COMMISSIONERS, *et al.*,
Defendants.

MOTION FOR EXTENSION OF TIME

[Filed Jul. 12, 1990]

Denied this 11th day of July, 1990.

/s/ William M. Nickerson
WILLIAM M. NICKERSON
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civil Case No. WN-89-1402

SHARON TEMKIN, *et al.*,
Plaintiffs,

v.

FREDERICK COUNTY COMMISSIONERS, *et al.*,
Defendants.

MOTION TO ALTER OR AMEND THE JUDGMENT

[Filed Jul. 12, 1990]

Denied this 11th day of July, 1990.

/s/ William M. Nickerson
WILLIAM M. NICKERSON
United States District Judge